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Nos. 85-1658
85-1660

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellants,

v.

FLORIDA POWER CORPORATION, *et al.*,
Appellees.

GROUP W CABLE, INC., *et al.*,
Appellants,

v.

FLORIDA POWER CORPORATION, *et al.*,
Appellees.

On Appeal From The United States Court Of Appeals For The Eleventh Circuit

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BRIEF FOR APPELLEES ALABAMA POWER COMPANY ARIZONA PUBLIC SERVICE COMPANY and MISSISSIPPI POWER & LIGHT COMPANY

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QUESTIONS PRESENTED

1. Whether the Eleventh Circuit was correct in holding that a federal statute authorizing the permanent physical occupation of an electric company's property by a cable television company constitutes a taking of the electric company's property, for which just compensation is required?

2. Whether the Eleventh Circuit was correct in holding that Congress may not impose a binding rule on the Judiciary concerning what compensation is "just" under the fifth amendment?

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, the following parties participated in the proceeding before the Eleventh Circuit: National Cable Television Association, Inc., Cox Cablevision Corporation, Tampa Electric Company, Mississippi Power & Light Company, Arizona Public Service Company, Alabama Power Company, and Acton Corporation.[1]

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[1] Pursuant to Supreme Court Rule 28.1, Mississippi Power & Light Company has the following affiliates: Arkansas Power & Light Co., Louisiana Power & Light Co., System Fuels, Inc., Middle South Energy, Inc., Middle South Services, Inc., and Middle South Utilities, Inc. Alabama Power Company has the following affiliates: Georgia Power Co., Gulf Power Co., Piedmont Forest Co., Southern Company Services, Inc., Southern Electric Generating Co., Southern Electric International, Inc., and The Southern Company. Arizona Public Service Company has the following affiliates: AZP Group, Inc., APS Fuels Co., APS Finance Co., N.V., and Bixco, Inc.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 772 F.2d 1537. The orders of the Federal Commu-

nications Commission and its Common Carrier Bureau are unreported.

JURISDICTION

Jurisdiction of this Court was invoked pursuant to 28 U.S.C. § 1252. Probable jurisdiction was noted on June 2, 1986.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The fifth amendment to the United States Constitution provides:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The statutory provision at isue in this proceeding, the Pole Attachment Act, is set out at 47 U.S.C. § 224 (West Supp. 1985).

COUNTERSTATEMENT OF THE CASE

The Statutory Framework

As recounted by the court below, since the advent of cable television in the 1950s, most cable companies have constructed their distribution systems by attaching their equipment to the distribution poles owned by telephone and electric utilities. The attachments are made pursuant to private contracts between the pole owner and the cable company, and usually specify an annual fee to be paid to the pole owner.

In 1978, Congress enacted legislation providing the Federal Communications Commission with jurisdiction

to regulate the rates, terms and conditions of cable television pole attachments. Pub. L. No. 95-234, § 6, 92 Stat. 33, 35-36 (codified as amended at 47 U.S.C. § 224 (West Supp. 1985)) ("Pole Attachment Act"). Congress directed the FCC to set "just and reasonable" pole attachment rates, and established a binding formula that the FCC must use in determining what rates are just and reasonable. Pursuant to that formula, the FCC has ruled that on a typical utility pole, on which three parties have attachments (the electric, telephone, and cable companies), the cable company may be charged no more than one-thirteenth of the costs of owning and maintaining the pole. *Second Report and Order in CC Docket 78-144*, 72 F.C.C. 2d 59 (1979).[1] In addition to regulating rates, the FCC has also exercised control, pursuant to the Act, over the entry and exit of utilities from the provision of pole attachments. In a variety of orders, the FCC has required utilities to provide new pole attachments, and prevented utilities from ceasing to provide pole attachments.[2]

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[1] The cable interests contend, and the Act is premised upon the notion, that cable operators have no alternative but to attach their equipment to utilities' property. However, it is quite feasible to place cable facilities underground instead. In point of fact, both utilities and cable operators increasingly are forced to bury their facilities because of community opposition to aboveground lines. *Cf.* S. Rep. No. 580, 95th Cong., 1st Sess. at 18 (Nov. 2, 1977) *reprinted in* 1978 U.S. Code Cong. & Admin. News 109, at 126.

[2] In enacting this legislation, Congress elected not to regulate the rates charged for a number of similar types of attachments, for example, the rates electric companies charge telephone companies for attachment. According to the legislative history, this is because electric and telephone companies were found to pos-

The Case Below at the FCC

In 1980 and 1981, Teleprompter Corp. and several other cable firms filed complaints against Florida Power at the FCC asking the Commission to abrogate their pole attachment contracts with Florida Power and substitute lower rates for the rates they had agreed to in their agreements. Florida Power responded to the cable operators' complaints by alleging that its rates were fully justified, and pointing out that the relief requested by the cable operators (if granted) would violate constitutional prescriptions against the taking of private property for public use without just compensation.

The FCC's Common Carrier Bureau, acting on delegated authority, granted the cable operators' requests in full. In fact, the Common Carrier Bureau lowered Florida Power's rates even further than the cable operators had requested. In place of the $6.00 rates contained in the cable operators' contracts with Florida Power, the Common Carrier Bureau substituted a rate of $1.79. Although the cable operators had not objected to paying the maintenance expenses established by Florida Power, the Common Carrier Bureau *sua sponte* disallowed the majority of this ex-

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sess relatively equal bargaining power. The rates negotiated in these arms-length transactions generally exceed cable television rates significantly. For example, while telephone attachment rates are generally $9-$12, cable attachment rates averaged $4-$6. Under the FCC's formula, however, rates have averaged approximately $1.75, and at times have been set as low as $0.75. In most cases, FCC rate orders have mandated reductions averaging 65-80% of the contract rate. *E.g.*, Tele-Communications, Inc. v. Mountain States Tel. & Tel. Co., FCC Mimeo No. 1948 (released Dec. 27, 1983) (80% reduction when rate lowered from $4.00 to $0.83).

pense. The Common Carrier Bureau disallowed more than half of the administrative expenses documented by Florida Power, and permitted only four limited categories of administrative expense to be recovered, pursuant to a ratemaking methodology later held to be arbitrary and capricious by the District of Columbia Circuit. *Alabama Power Co. v. FCC*, 773 F.2d 362, 370 (D.C. Cir. 1985). The Bureau permitted Florida Power to recover less than one-third of its tax expenses, pursuant to a policy later held to be arbitrary and capricious by the Fifth Circuit in *Texas Power & Light Co v. FCC*, 784 F.2d 1265, 1272 (5th Cir. 1986).[3] The Bureau completely ignored Florida Power's constitutional arguments.[4]

Florida Power filed a timely application for administrative review, requesting the full Commission to reverse the Common Carrier Bureau's ruling, and pointing out errors in the Bureau's rate computation. Rather than ruling on Florida Power's appeal, however, the FCC staff refused to process the application.

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[3] In addition to the present case, two other FCC pole attachment complaint cases have been reviewed in the courts of appeal. In *Alabama Power Co. v. FCC, supra,* Appellee Alabama Power Company challenged five aspects of the FCC's rate computation in its case as arbitrary and capricious. The D.C. Circuit ruled against the Commission with respect to each issue. In *Texas Power & Light Co. v. FCC, supra,* the utility challenged two aspects of the FCC's rate computation. The Fifth Circuit vacated the FCC's order and remanded for further analysis of both issues. Neither of those cases, however, presented the constitutional issues to be decided here.

[4] In dozens of cases, including all of the complaint cases that have been reviewed by the appellate courts, the FCC reduced the rates of the utility even lower than the cable operators had requested.

1981 passed... 1982 passed... 1983 passed... Finally, late in 1984, the Commission issued a brief decision rejecting all of Florida Power's arguments, and summarily affirming the Common Carrier Bureau's earlier actions.[5]

The Decision of the Court of Appeals

On appeal, the Eleventh Circuit vacated the FCC's order. The court of appeals applied the decision of this Court in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), and found that the FCC order authorizing the permanent physical occupation of Florida Power's property for less than one-third of the rate agreed to by Teleprompter Corp. (and its successor-in-interest, Group W Cable, Inc.) constituted a taking of Florida Power's property. Having found a taking, the court of appeals held that the procedures established under the Pole Attachment Act (and in particular the binding rate formula) were inadequate to ensure that Florida Power will receive just compensation as required by the fifth amendment. The court held that the principle of separation of powers precludes Congress from prescribing a binding rule for the determination of just compensation, which, the court held, is a judicial function. Since the Pole Attachment Act prescribes just such a binding rule, the court held that the Act was constitutionally inadequate, and vacated the FCC's order. For this point, the Eleventh Circuit relied principally upon *Monongahela Navigation Co. v. United States*,

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[5] At no time was an evidentiary hearing held, nor is there any separation of functions on the FCC Staff. The same staff members that rule on the case for the Common Carrier Bureau are responsible for drafting the opinion for the full Commission.

148 U.S. 312 (1893), as well as more recent precedents.

Appellees ("the Utility Parties") submit that each point of the Eleventh Circuit's analysis is correct and well grounded in the decisions of this Court.

SUMMARY OF ARGUMENT

The facts in this case are virtually indistinguishable from *Loretto v. Teleprompter Manhattan CATV Corp.*, *supra*. The court of appeals correctly held that the permanent physical occupation of Florida Power's utility poles authorized by the Pole Attachment Act amounts to a taking of Florida Power's property, just as the permanent physical occupation of a New York landlord's property amounted to a taking in *Loretto*.

The Federal Appellants' contention that the Pole Attachment Act gives the cable operators no right to attach equipment to Florida Power's poles overlooks numerous FCC decisions providing exactly that, as well as the extensive nature of the regulation that the FCC exercises over access to poles. The FCC has on numerous occasions required utilities to provide access to poles, as well as prevented utilities from ceasing to provide access to poles.

The cable operators' contention that utilities do not lose money when pole attachment rates are reduced is factually incorrect. Lost pole attachment revenues are not simply offset by increases in electric rates, they are lost forever.

Finally, the court of appeals correctly held that Congress cannot establish a binding rule pursuant to which the FCC must limit the compensation to be paid for the taking of utility property.

ARGUMENT

I. The Court of Appeals Correctly Applied The Loretto Doctrine to the Facts of this Case.

The fifth amendment to the United States Constitution prohibits the taking of private property for public use without the payment of just compensation. For many years, the courts have struggled to determine when a governmental interference with property rights will constitute a "taking." In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), this Court provided clear guidance as to when a taking will be found.

The issue in *Loretto*, as stated by Justice Marshall, was "whether a minor but permanent physical occupation of an owner's property authorized by government constitutes a 'taking' of property for which compensation is due under the Fifth and Fourteenth Amendments of the Constitution." 458 U.S. at 421. This Court answered that question in the affirmative.

Loretto involved a New York statute that prohibited landlords from interfering with the installation of cable television facilities on their premises, as well as prohibiting them from charging cable operators more than a one-time fee of $1.00 for the right to occupy their property. 458 U.S. at 424. The New York Court of Appeals upheld the statute as a legitimate exercise of the police power. *Id.* This Court reversed on the grounds that application of the statute effected a taking. *Id.* at 426.[6]

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[6] Historically, this Court has taken a much stricter view of physical invasions of property than of non-possessory regulations on use. In *Loretto*, as in this case, a physical invasion of property

The *Loretto* decision affirmed the traditional rule that a permanent physical occupation authorized by the government is a taking *per se*. *Id.* at 434-35. Application of that standard to the facts of this case leads inescapably to the conclusion that Florida Power's property has been taken in the same manner and to the same degree as was the New York landlord's property in *Loretto*.

The equipment Teleprompter (and later Group W Cable) attached to Florida Power's poles, as the court of appeals noted, is "virtually indistinguishable" from the equipment it attached to Mrs. Loretto's apartment house in New York. 772 F.2d at 1544. There can be no dispute that the equipment physically occupies Florida Power's distribution poles.

It is also clear that these attachments are neither temporary, nor invited at the reduced rates mandated by the FCC and Congress. Many utilities have had cable attachments on their poles continuously since the 1950s—a period of some 30 years. This is hardly temporary. Moreover, the attachments have been authorized or compelled by the FCC on numerous oc-

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was at issue. *See Loretto*, 458 U.S. at 440 n.19. At one time, physical invasions were the only type of actions that were recognized as takings. In the early years of this century, however, in cases such as Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), this Court began to expand the type of actions that could be considered a taking, to include certain types of non-possessory regulations. For these non-possessory actions, the Court developed a three factor test for determining whether a taking has occurred. Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978). Appellants confuse the traditional standard for physical invasions, as described in *Loretto*, with the test for non-possessory regulations, Brief for Appellants at 22, but the two are not the same.

casions. As noted, in addition to exercising rate regulation, the FCC has exercised a form of entry and exit regulation pursuant to its statutory mandate. In some cases, the FCC has required utilities to provide new pole attachments. In others, it has refused to permit utilities to cease providing existing pole attachments. In one case, the FCC ruled that a utility must expand its pole facilities to make room for additional new cable attachments.[7] These cases establish clearly that cable attachments are "authorized" by the Act within the meaning of *Loretto*.

A review of several FCC decisions will illustrate the broad scope of the entry/exit regulation exercised

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[7] Group W, in an attempt to distinguish *Loretto*, asserts that because Florida Power is subject to regulation as an electric utility it is not entitled to fifth amendment protection with respect to the physical occupation of its property by cable companies. Of course, this overlooks the fact that Mrs. Loretto's apartment house was dedicated to the New York housing market and subject to New York City's rent control law and numerous other housing ordinances. This Court found no diminution of her constitutional rights, however. Group W is essentially trying to create a "utility exception" to the fifth amendment, a theory that must be firmly rejected. This Court recently rejected the notion that utilities were somehow second-class citizens not entitled to the full constitutional protections accorded others. Pacific Gas and Elec. Co. v. Public Util's Comm'n of California, 106 S.Ct. 903 (1986). *See also* Consolidated Edison Co. of New York v. Public Serv. Comm'n of New York, 447 U.S. 530 (1981). The longstanding rule of this Court is that even utility property that is clothed with a public interest, and dedicated to public use, remains private property subject to full constitutional protections. St. Joseph Stock Yards Co. v. United States, 298 U.S. 38 (1936). In the case of the rental of pole space, moreover, the courts have held that this is not a utility service or property devoted to public use. General Tel. Co. v. FCC, 413 F.2d 390, 393 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969).

by the FCC. Utilities and cable operators at times have become embroiled in disputes over such matters as late payment (and non-payment) of rentals, attachments not made in compliance with safety code requirements, the making of unauthorized attachments, and so on. Some utilities involved in these disputes have sought to cancel their pole attachment contracts with cable operations. In each of these cases, the FCC has issued orders preventing the utilities involved from terminating service to the cable operators involved, even where the cable operator had violated certain terms in the pole attachment agreement or where a termination provision in a contract was lawfully invoked. *E.g.*, *Whitney Cablevision v. Southern Indiana Gas & Electric Co.*, Mimeo No. 841 (Nov. 16, 1984) (unauthorized attachments); *Tele-Communications, Inc. v. South Carolina Electric & Gas Co.*, Mimeo No. 5957 (Aug. 16, 1983) (safety violations, unauthorized attachments, late payments). It may be that these cases reflect sound public policy, and that utilities should not be permitted to cease providing pole attachments under these circumstances. But that does not transform the utilities' participation into a voluntary undertaking, nor does it detract from the coercive nature of the government's exercise of entry/exit regulation. The cable interests fail to cite even a single instance in which a utility has been permitted by the FCC to refuse to allow a cable operator to continue to occupy space on its poles.[8]

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[8] The government suggests that the case may not be ripe because Florida Power has not yet attempted to physically remove Teleprompter's equipment. Such a move would clearly be futile in light of the FCC's numerous rulings prohibiting utilities

In one significant case, *David Bailey d/b/a Port Gibson Cable TV v. Mississippi Power & Light Co.*, Mimeo No. 36118 (released Sept. 11, 1985), a cable operator asked Appellee Mississippi Power & Light Company to replace approximately 50% of its poles in a small town in Mississippi in order to permit the attachment of its cable. Some of the attachments would be on poles already occupied by an existing cable operator, and some would be in new developments where no cable attachments currently existed. The addition of further attachments on poles already occupied by existing power, telephone and at times cable facilities required that more than half the poles would have to be replaced. Mississippi Power & Light Company protested at the FCC that the cost of so many pole replacements would be prohibitive, that multiple attachments created additional safety hazards for MP&L's linemen climbing on the poles, and that its personnel were needed elsewhere. MP&L further argued that the FCC should not (for constitutional reasons) order access on poles, and that it simply did not want to engage in this business. The FCC rejected these contentions and held that Mississippi Power & Light Company must replace its poles and expand its facilities in order to permit the cable

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from doing precisely that. Furthermore, the government's argument is inconsistent with this Court's holding in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982). There, the Court held that bankruptcy judges who are appointed for fixed terms, could be removed for cause, and who could suffer salary diminution, could not constitutionally exercise certain powers granted them in the Bankruptcy Act of 1978, notwithstanding the fact that no removal or salary diminution had been attempted. The Court rejected the argument that the case was not ripe for decision because no removal or diminution had been attempted.

company to attach. *Id.* at para. 14. MP&L was ordered to provide attachments even on poles where no current cable attachment existed. *Port Gibson* flatly contradicts any assertion that cable attachments are simply a matter of invited access. Mississippi Power & Light Company is under direct order by the FCC to permit the occupation of its poles by Port Gibson Cable TV—*even on poles where no other communications attachment exists*. This can hardly qualify as a case of invited access.[9]

The court of appeals also properly recognized that Florida Power's invitation to Teleprompter to occupy its poles at one price does not imply an invitation to occupy its poles at a small fraction of that price established by the FCC. 772 F.2d at 1543. It is a matter of elementary law that a property owner's consent for a stranger to enter his property subject to a condition does not imply consent if the condition is not met. *Restatement (Second) Torts*, § 168 (1965).[10]

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[9] Again, even assuming *arguendo* that sound policy reasons may exist for requiring such access, it is not invited access. Furthermore, an invitation to one does not imply an invitation to all, nor does an invitation for a prescribed time period imply a permanent invitation.

[10] Appellants strenuously argue that utilities are subject to regulation, Brief for Appellants at 18-20, a point not in dispute. What is at issue here is a taking, not regulation. Furthermore, simply because electric companies are regulated with respect to one aspect of their affairs, does not mean that they have a utility obligation with respect to all other aspects. For example, some electric utilities sell ranges, refrigerators, and even light bulbs. No one would contend that these are utility obligations. Furthermore, the provision of pole attachments has long been held to be a matter of private contract, not a common carrier, utility-type obligation. General Tel. Co. v. FCC, 413 F.2d 390, 393 (D.C. Cir.) *cert. denied*, 396 U.S. 888 (1969).

Appellants suggest that Florida Power suffered no loss when its pole attachment rates were reduced by two-thirds pursuant to the FCC's rate formula, because it allegedly could make up the difference by increasing the rates to its electric ratepayers. Brief for Appellants at 7,23. Such a suggestion is as poorly conceived in policy as it is erroneous in fact. As the Fifth Circuit recognized in *Texas Power & Light Co.*, it is unreasonable to permit cable operators to escape payment for their share of pole costs by thrusting those costs on the general body of ratepayers. 784 F.2d at 1272. Furthermore, it is untrue that all pole costs not borne by the cable operators are necessarily picked up by electric ratepayers. Some state commissions do not simply offset pole attachment revenues against retail electric rates. Furthermore, even where electric rates are premised on receiving a certain amount of revenue from cable operators, when that amount is reduced by the FCC, only the utility loses until its rates are readjusted.[11] Finally, even if some state utility commissions did permit the recovery of a pole attachment shortfall from electric ratepayers, the cable operators have cited no proposition

[11] At several points the cable interests grossly misconstrue the nature of utility ratemaking when they assert that utilities are "guaranteed" to receive their rate of return. At best, utilities are theoretically assured of the opportunity to earn their authorized rate of return, which they may or may not achieve, but they are not assured of receiving anything. The cable interests depict a 19th century view of utility regulation, in which there is a complete monopoly by the utility, and perfect ratemaking by regulatory commissions, assuring complete cost recovery. This view is inconsistent with the pro-competitive and deregulatory policies favored by most states. Electric companies now face competition in their service areas for many services. In this environment, their returns are anything but guaranteed.

of law that would require them to continue the practice, nor any reason in policy why they should.

The poles owned by utilities are used for rental purposes, in addition to their use for attaching electric wires. Utilities rent space on their poles to numerous entities. Space is rented to telephone companies to attach telephone wires; to municipalities to attach street lights and signs; to cable operators for cable attachments; and increasingly to fiber optic networks to attach fiber optic facilities for advanced telecommunications services. Together, these rentals make an important contribution to a utility's revenues. The drastic reduction of these revenues, or the cable operator's portion of them, clearly results in a loss for the utility.[12]

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[12] The Federal Appellants argue that cable operators use only space that is surplus and not needed for electric lines. Brief for Federal Appellants at 18. This overlooks the rental value that pole space has traditionally been used for by electric companies. Thus, utilities are deprived of the use of the space for rental purposes. Furthermore, Federal Appellants' claim that Florida Power may reclaim the pole space at any time, *id.* at 18, appears to misconstrue the contractual provisions at issue. These provisions, read in their entirety with other provisions of the contract, do not appear to permit Florida Power to exclude cable operators from its poles, but rather merely permit Florida Power to install new or larger poles when necessary. Both the Federal Appellants and the cable operators appear to concede this point. Brief for Federal Appellants at 18 n.24; Brief for Appellants at 25 n.58. It is the general practice of utilities to pay for a new pole themselves when such replacements are necessary due to increases in their needs for space.

The Federal Appellants' claim that cable television occupation of poles is not "permanent" within the meaning of *Loretto* appears inconsistent with its position in McDonald, Somers &

II. The Pole Attachment Act Is Unconstitutional Because It Does Not Provide For a Proper Judicial Determination of Just Compensation for Property Taken Under the Act.

The Eleventh Circuit correctly found that the Pole Attachment Act is unconstitutional because it allows Congress, rather than the judiciary, to determine what constitutes just compensation for the taking of Florida Power's property.[13] Under the Act, the FCC is required to establish the pole attachment rates that a utility may charge pursuant to a binding formula mandated by Congress. The Eleventh circuit correctly concluded that "[b]y prescribing a binding rule in regard to the ascertainment of just compensation, Congress has usurped what has long been held an exclusive judicial function." 772 F.2d at 1546 (citations omitted).

Frates v. County of Yolo, No. 84-2015 (June 25, 1986), wherein the government argued that even temporary takings required compensation. Brief for the United States at 19. There, the government pointed out that even the appropriation of a leasehold interest is within the scope of the fifth amendment, citing United States v. General Motors Corp. 323 U.S. 373 (1945) and Kimball Laundry Co. v. United States, 338 U.S. 1 (1949)

[13] Contrary to appellants assertions, the Eleventh Circuit did not find the Pole Attachment Act unconstitutional on the grounds that an administrative agency may never make an assessment of facts relevant to the determination of just compensation. The decision is a narrow one directed at the unique statutory and administrative scheme created by the Pole Attachment Act. Other statutory schemes may pass constitutional muster even though they incorporate the relevant factual findings of an administrative agency. However, the Pole Attachment Act both restricts the scope of the FCC's inquiry into the issue of compensation for the use of Florida Power's poles by cable companies, and does not allow for a judicial determination of just compensation for the resulting taking of private property.

The decision below is consistent with the well established doctrine that just compensation for the governmentally authorized taking of private property is a constitutional right, and the ultimate determination of what compensation is just is reserved to the judiciary. *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327 (1893). The availability of limited judicial review of an administrative record restricted by Congress does not satisfy the constitutional requirement that the judiciary ultimately determine just compensation. The decision below is also consistent with this Court's recent attempts to insure that there is no "broad departure from the consitutional command that the judicial power of the United States must be vested in Article III courts," and not in Congress. *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 64 (1982). *See also United States v. Raddatz*, 447 U.S. 667 (1980).

A. The Pole Attachment Act Usurps the Judiciary's Power to Determine Just Compensation for a Taking of Property.

Under the Pole Attachment Act, the FCC is required to award compensation for the use of a utility's poles pursuant to a binding formula used to calculate a "just and reasonable" rate for cable attachments. 47 U.S.C. § 224(b) and (d). This formula specifies that a utility recover:

> not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity which is occupied by the pole attachment, by the sum of the operating expenses and actual capital

> costs of the utility attributable to the entire pole, duct, conduit or right of way.

47 U.S.C. § 224(d). In practice, the FCC has focused on determining the maximum rate for pole attachments. The rule applied by the FCC to establish the maximum rate a utility may charge a cable company reduces to the following formula:

$$\text{Maximum Rate} = \frac{1 \text{ foot}}{13.5 \text{ feet}} \times \text{Operating Expenses} + \text{Capital Costs of Pole}$$

The FCC is required to award compensation within the bounds of this formula. Consequently, the FCC only considers information related to the elements of the statutory formula in its resolution of complaints filed by cable companies.

As a measure of just compensation for a taking of property under the fifth amendment, the Act's formula is overly restrictive. It establishes pole attachment rates based on the limited factors selected by Congress alone, while ignoring factors traditionally held relevant by the Judiciary to the determination of just compensation, such as fair market value. *See, e.g., Kirby Forest Industries v. United States*, 104 S.Ct. 2187, 2191 n.14 (1984); *United States v. Commodities Trading Corp.*, 339 U.S. 121, 126 (1950); *United States v. Miller*, 317 U.S. 369, 374 (1943); *United States v. 320.0 Acres of Land, More or Less, in County of Monroe, State of Florida*, 605 F.2d 762, 781 (5th Cir. 1979); *United States v. 15.3 Acres of Land, Etc.*, 154 F.Supp. 770-78 (M.D. Pa. 1957). The formula's failure to permit the consideration of fair market value, or other factors that may be relevant,

severely limits the scope of FCC proceedings.[14] In place of a determination of just compensation pursuant to factors long held by this Court to be relevant, the Pole Attachment Act prescribes a "binding rule" which leaves the FCC no latitude to explore or award fair market value or any other constitutionally acceptable measure of compensation.[15]

In striking down the Pole Attachment Act, the Eleventh Circuit relied on the well established doc-

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[14] While acknowledging this fact, the government relies on *United States v. Commodities Trading Corp.*, 339 U.S. 121 (1950), to argue that the Pole Attachment Act's formula should be accepted as the measure of just compensation anyway. *United States v. Commodities Trading Corp.* is inapposite. In that case, the Court accepted ceiling prices fixed during World War II by the Emergency Price Control Act of 1942 as the measure of just compensation because "the necessities of a wartime economy require[d] that ceiling prices be accepted as the measure of just compensation. . ." 339 U.S. at 125. The Court was careful to point out that "[i]n peacetime when prices are not fixed, the normal measure of just compensation [is] current market value." 339 U.S. at 126.

The government also cites dicta in *Alabama Power Co. v. FCC*, 773 F.2d 362 (D.C. Cir. 1985) in support of its argument that the congressional formula is equivalent to just compensation. However, the court of appeals in Alabama Power expressly noted that it had not been asked to decide whether the congressional formula satisfied constitutional standards. 773 F.2d at 367 n.8.

[15] The utilities have argued, for example, that one measure of fair market value might be the comparable terms negotiated between electric and telephone companies, two entites Congress has found to be of roughly equal bargaining power. A survey of the results of these arms-length transactions might be considered evidence of fair market value, since the telephone company's attachment to the pole is virtually indistinguishable from the cable company's.

trine that Congress may not limit or prevent the judiciary from ultimately determining compensation for a taking of private property. *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 51-52 and 77-78 (1936); *Baltimore & O.R. Co. v. United States*, 298 U.S. 349, 364-65 (1936); *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327 (1893); *Miller v. United States*, 620 F.2d 812, 837 (Ct. Cl. 1980); *American-Hawaiian Steamship Co. v. United States*, 124 F.Supp. 378, 382-83 (Ct. Cl. 1954), *cert. denied*, 350 U.S. 863 (1955); *Hudson Navigation Co. v. United States*, 57 Ct. Cl. 411, 415 (1922). This Court, in the seminal *Monongahela Navigation Co.* case, explained the fundamental constitutional defect of a statutory limit on just compensation:

> By this legislation, Congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial and not a legislative question. The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry.

148 U.S. at 327. The Utility Parties submit that the rule of *Monongahela* is as sound today as it was in

1893, and urge the Court to reaffirm this important principle.[16]

B. The Opportunity for Limited Judicial Review of FCC Rate Orders Does Not Correct the Constitutional Infirmity of the Act.

Appellants seek to uphold the Act based on the availability of limited appellate review of FCC rate orders, stating that this satisfies the constitutional requirement of a judicial determination of just compensation. However, judicial review of the FCC's pole attachment rate decisions generally is limited to assessing the Commission's compliance with Congress' formula, and is limited to an administrative record containing only evidence related to the elements of the Act's statutory formula. The Act does not even purport to establish just compensation. Appellate review of such a narrowly constricted record fails to permit the judicial inquiry into just compensation mandated by the Constitution.[17]

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[16] The origins of the just compensation clause lie in a distrust by the Framers of colonial legislatures, which regularly took private property without compensating the owner. For example, many colonies took private land to build public roads without compensation, and goods of all types were impressed for military uses without payment. *See* Note, The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment, 94 Yale L.J. 694, 698 (1985). The fifth amendment was established to protect against these perceived legislative excesses. The protections offered by the just compensation clause, however, would be illusory if the legislature could set the rule of compensation for property that has been taken.

[17] Significantly, none of the cases cited by the appellants in support of their argument involved the kind of limited judicial review of a narrowly constricted administrative record involved

Appellate review of FCC pole attachment rate orders under the Administrative Procedure Act (5 U.S.C. § 706) is limited to consideration of the record developed before the Commission. "The reviewing court is not generally empowered to conduct a de novo inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry." *Florida Power & Light Co. v. Lorion*, 105 S.Ct. 1598, 1607 (1985). This Court has repeatedly stressed the limited scope of judicial review of agency decisions. *See, e.g., Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 103 S.Ct. 2856 (1983).

The evidence considered by the FCC in pole attachment proceedings is only that evidence which the FCC deems relevant to its application of the "binding rule" in the Act.[18] The ratemaking formula in the Act

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in this case. *Bauman v. Ross*, 167 U.S. 548 (1897); and *United States v. Jones*, 109 U.S. 513, address seventh amendment issues only. *United States v. Commodities Trading Corp., supra*, was an appeal from the Court of Claims which had conducted a full, unrestricted inquiry into the issue of what constituted just compensation. In *Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984), the Court recognized the availability of a Tucker Act claim against the United States—a proceeding that also presents an opportunity for an unrestricted determination of just compensation.

[18] The government argues that the Eleventh Circuit could have cured inadequacies in the record by permitting the introduction of new evidence at the appellate level. Brief for the Federal Appellants at 28, citing *American Trucking Ass'n v. United States*, 344 U.S. 298, 320 (1953). This is a novel and erroneous concept. The Court's reference to the introduction of new evidence in *American Trucking Ass'n* pertained to the ability of a federal district court to hear new evidence, not a court of appeals. A court of appeals, by its nature, is not well equipped to conduct evidentiary hearings or to make findings of fact.

thus binds the reviewing court, which reviews the FCC's compliance with the statutory mandate in implementing the formula.[19] The Pole Attachment Act requires the FCC to consider evidence in pole attachment rate cases only concerning the elements of the statutory formula. Judicial review on the basis of such a truncated record is merely an assessment of the FCC's compliance with the Congressional formula, and perpetuates the Act's constitutional defect of circumscribing the ultimate judicial determination of just compensation.[20] *See Northern Pipeline Construction*

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[19] Significantly, in both the *Alabama Power Co.* and *Texas Power & Light Co.* cases the courts of appeal found that the FCC had arbitrarily exceeded even the Congressional formula for setting rates.

[20] The cable interests suggest that the Act is constitutional, notwithstanding the inadequacy of judicial review of an administrative record limited to the statutory formula, on the basis of the alleged ability of utilities to obtain just compensation from the Claims Court under the Tucker Act, 28 U.S.C. § 1491 (1982). Brief for Appellants at 37, n.79. Notably, the government declined to support the Act's constitutionality by reference to the Tucker Act. Brief for the Federal Appellants at 27, n.33. The reliance of the cable companies on the Tucker Act is misplaced.

The structure of the Pole Attachment Act and its legislative history require the inference that Congress withdrew Tucker Act jurisdiction with respect to pole attachment rates. The Act broadly specifies that "the Commission shall regulate the rates, terms and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable." 47 U.S.C. § 224(b)(1). The only exception to the FCC's regulatory authority over pole attachment rates is "where such matters are regulated by a State." 47 U.S.C. § 224(c)(1). Tucker Act jurisdiction over pole attachment rates is inconsistent with the structure and purposes of the Pole Attachment Act. The statute's approach to setting pole attachment rates is based upon an

Co. v. Marathon Pipe Line Co., 458 U.S. 50, 86 n.39. (1982) (plurality opinion).

C. The Pole Attachment Act's Usurpation of the Judiciary's Power to Ultimately Determine Just Compensation for a Taking of Property Violates Article III.

The Eleventh Circuit correctly held that the Pole Attachment Act effectively prevents the Judiciary from ultimately determining the measure of just compensation for a taking of property under the fifth amendment. Implicit in the Eleventh Circuit's decision is the recognition that by prescribing a binding rule for fixing pole attachment rates, the Pole Attachment Act prevents an Article III court from ultimately determining what constitutes just compensation for a

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allocation of costs which change over time, and the rate established may vary significantly from year to year. Accordingly, the amount that the utility would be entitled to recover under the Tucker Act would similarly vary from year to year. To hold that utilities must resort to the Tucker Act for just compensation would result in an annual ritual whereby the utility would first go to the FCC for a determination of its statutory rights for that year, then (several years later, after exhausting agency and judicial review of the Common Carrier Bureau's decision) go to the Claims Court for its constitutional entitlement for that year. Nor could this process be avoided by the award of a one-time fee as compensation for the taking for all future years. Because cable operators are constantly attaching to new poles as they expand their systems, utilities would be forced periodically to trek to the FCC and the Claims Court for determinations of their statutory and constitutional entitlements for the newly taken pole space. Such a procedure is a plainly inadequate remedy in light of the relatively small amounts of money involved for any given cable system in any particular year and would amount to a deprivation of due process.

taking of private property.[21] This offends the principle of separation of powers and is a violation of Article III.

The Framers of the Constitution recognized that "[t]he accumulation of all powers legislative, executive, and judiciary in the same hands... may justly be pronounced the very definition of tyranny." The Federalist No. 47, p. 324 (J. Cooke ed. 1961) (J. Madison). To ensure against such tyranny, the Framers established three distinct branches of the federal government. This Court has consistantly held that "[t]he Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Buckley v. Valeo*, 424 U.S. 1, 122 (1976).

Article III establishes a broad policy that federal judicial power shall be vested in the judicial branch of government, whose independent judges enjoy life tenure and fixed compensation. "As an inseparable element of the constitutional system of checks and

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[21] In their brief, Federal Appellants argue that if the Eleventh Circuit meant to limit consideration of just compensation claims to Article III courts, then it was rejecting the longstanding jurisdiction of the Claims Court (an Article I court) to consider issues of just compensation. Brief for Federal Appellants at 23. This is not the case. The Utility Parties are not challenging Congress' authority under Article I to vest some decision-making related to just compensation in tribunals such as the Claims Court that lack the attributes of Article III courts. The Claims Court, however, is not restricted by Congress concerning the evidence it may consider in determining just compensation. In contrast, the Pole Attachment Act's binding formula limits the FCC's decision-making powers, as well as the subsequent judicial review.

balances, and as a guarantee of judicial impartiality, Article III both defines the power and protects the independence of the judicial branches." *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58 (1982). *See also Thomas v. Union Carbide Agricultural Products Co.*, 105 S. Ct. 3325 (1985).

In substance, the Pole Attachment Act effectively prevents the judiciary from ultimately determining just compensation for property taken under the Act. By prescribing a binding rule for measuring compensation without judicial input Congress has appropriated for itself the task of determining just compensation. This it cannot do. The limited judicial review of this Congressional formula available under the Act does not preserve "the appropriate exercise of the judicial function." *Crowell v. Benson*, 285 U.S. 22, 54 (1932).[22] *See Northern Pipeline Construction Co., supra*, at 86 n.39 (rejecting the view "that Art. III is satisfied so long as some degree of appellate review is provided"); *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1855).

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In sum, the court of appeals correctly analyzed the taking issue in this case and applied the established precedents of this Court, as most recently stated in *Loretto*. In holding the binding formula of the Pole Attachment Act unconstitutional as a violation of the

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[22] The Court in *Crowell* found that the requirement of *de novo* review as to certain facts was not "simply the question of due process in relation to notice and hearing," but was "rather a question of the appropriate maintenance of the federal judicial power." *Crowell v. Benson*, 285 U.S. at 56.

separation of powers principle, the Eleventh Circuit correctly and courageously applied principles lying at the heart of our Constitution.

CONCLUSION

For these reasons, the Utility Parties respectfully urge that the decision below be affirmed.

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